THE RIGHTS OF THE RIPARIAN OWNER UPON A FRESH-WATER STREAM NAVIGABLE IN FACT.

IN THE United States, with its numerous large streams, the matter of an accurate conception of the rights of this class of property owners becomes increasingly important as the utility and consequent value of these streams for the production of electric energy and merchantable products is the more fully realized: an item of our internal resources, which has been but slightly developed.

In examining our decisions it will be observed that there is a tendency in certain jurisdictions to reject the common law, which favored the riparian owner, upon the ground that the conditions in England where those principles were developed are widely different from those of this country; and that consequently the rules of law though satisfactory under the conditions in England, are unsuited to the needs of the United States, the *fact* being that the rules of the common law fully provide for the needs of this country, and the interest of the States and the public in its great channels of commerce, for which error it is not improbable that the members of the bar are largely responsible, by an omission, perhaps, to present correctly to the courts the common law principles which are controlling.

Going back into the obscurity of Bracton's time, we find little from which a definite conclusion may be reached upon this matter. There were cases reported from time to time, but not until the reign of James I was a clear-cut, enduring rule laid down; this case was The Royal Fishery of the River Banne,[1] in which the court held that the king had the same prerogative and interest in navigable water so high as the sea flows and ebbs as in the high seas, and that every navigable river in which the sea flows and reflows was a royal river, but that in a river not navigable the tenants on each side owned the soil to the thread of the stream.

[1] Davies' Reports 152.

Some fifty years later appeared a treatise entitled "De Jure Maris," [2] usually accredited to Lord Hale. The statements contained in this paper have been accepted as a correct exposition of the common law both in England and in the United States from that time until today.[3]

In Chapter IV, Lord Hale lays down the rule as stated in the Banne Case [4] that the sea and its arms so high as the tide flows and ebbs is a "royal" water, in the bed of which the riparian owner has no property.

In Chapter II, he says:

> "Fresh rivers of what kind soever, do of common right belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the propriety of the soil, and consequently the right of fishing, *usque filum aquæ*, and the owners of the other side, the right of soil or ownership and fishing unto the *filum aquæ* on their side. And if a man be owner of the land of both sides, in common presumption he is the owner of the whole river; and hath the right of fishing according to the extent of his land in length. With this agrees common experience."

This, as to *all* waters ("of what kind soever"), provided they are *not* waters in which the tide ebbs and flows.

In Chapter III, he sets apart another class of streams as a kind of subdivision of the preceding class, saying:

> "There be streams or rivers that are private and not only in propriety of ownership but also in use, as little streams and rivers that are not a common passage for the King's people."

He separates those fresh-water streams which are navigable in fact from those which are not so navigable, by saying that these last are private, not only in propriety of ownership *but also in use.*

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[2] See note to Ex parte Jennings, 6 Cowen 536.

[3] Jones *v.* Soulard, 24 How. 41; Hardin *v.* Jordan, 140 U. S. 371; Crenshaw *v.* Slate River Co., 6 Rand. (Va.) 271; Lorman *v* Benson, 8 Mich. 14, 77 Am. Dec. 435; Comm. *v.* Chapin, 5 Pick. (Mass.) 199; Hindson *v.* Ashby (1896), L. R. 2 Ch. 1.

[4] *Supra.*

And in this same chapter, speaking of rivers which are in fact navigable, he says:

> "And these, whether they are fresh or salt, whether they flow and reflow or not, are *prima facie publici juris,* common highways for man or goods, or both, from one inland town to the other. * * * And therefore all nuisances and impediments of passage of boats and vessels, though in the private soil of any person, may be punished by indictment and removed."

Which was an iteration of the statement in Chapter I that:

> "Though fresh rivers are, in point of propriety, as before, *prima facie* of a private interest; yet, as well fresh waters as salt, or such as flow and reflow, may be under two servitudes, or affected by them: viz, one of prerogative belonging to the King, and another of public interest, or belonging to the people in general."

As is subsequently pointed out the King's prerogative was the right of jurisdiction, of ferry franchises, and of pleasure and recreation upon the waters. And the other servitude was of passage by the people in boats or lighters, which of course did not attach in the case of streams, "that are not (large enough to be) a common passage for the King's people."

In the year 1877, the House of Lords, in opinions by Lords Hatherley, Blackburn, and Gordon, found as a fact that the river Leven was a "navigable river, free and open to the public," and held that, under the common law of England, the title to the bed of the stream was vested in one of the parties to the cause which owned both banks of it.[5] Lord Gordon said:

> "The Leven during the greater part of its course is a fresh-water stream, and is so at the point where the bridge in question has been erected. The *alveus* of such fresh-water rivers belongs to the properties along their banks. Where such a river is navigable, free and open to the public, the right which the public has in such a river is substantially a mere right to use the river for the purposes of navigation, similar to the right the public may have to passage along a public road or footpath through a private estate."

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[5] Ewing *v.* Colquhoun (1877), 2 App. Cas. 839.

Similar views were expressed in Bristow *v.* Cormican,[6] decided a year later.

At common law a river which was navigable *in law* must have been one in which the tide ebbed and flowed. A river in which there was no ebb and flow of tide was not navigable *in law*, whatever may have been the fact as to its actual capacity for navigation in boats or barges. And in rivers which were navigable in law, the riparian owner had no title to the bed thereof; but in rivers not navigable in law (whether or not they were navigable in fact) such owner owned as well the soil to the thread of the stream.[7] So that the question of actual navigability played no part in the determination of the question whether the riparian owner or the crown owned the bed of a stream; but only became pertinent upon an inquiry as to whether the public had any right in the waters of the stream.

Professor Cooley recognized this, saying:

> "The term 'navigable' at common law was only applied to those waters where the tide ebbed and flowed, but all streams which were of sufficient capacity for useful navigation, though not really 'navigable,' were public and subject to the same general rights which the public exercised in highways by land." [8]

But, excepting the matter of ownership of the soil, the riparian owner upon a stream navigable in law had nearly the same rights in the water, as the riparian owner upon a stream not navigable at law. These rights in both instances include the right to have the water remain in its place, to have his *contact*, the right of access, the right to draw nets upon the shore, the preferential right to secure the ferry franchise, and the right

[6] (1878) 3 App. Cas. Part II, 641; this case was reviewed by the Supreme Court of the United States in Hardin *v.* Jordan, *supra*, and adopted as conclusive authority as to what was the common law with respect to such waters.

[7] Hardin *v.* Jordan, *supra*; Middleton *v.* Pritchard, 4 Ill. 510; Adams *v.* Pease, 2 Conn. 481; Wright *v.* Seymour, 69 Cal. 122; 10 Pac. 323; Gaston *v.* Mace, 33 W. Va. 14, 10 S. E. 60; Smith *v.* Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Angell, Watercourses, 4 ed., § 542; Cooley, Const. Limt., 4 ed., § 735.

[8] Cooley, Const. Limt., 4 ed., § 735.

to have in its natural state whatever of commercial advantage may adhere to the favorable situation of property upon the bank of a body of water.[9] He also has the right to erect wharves so long as they do not interfere with navigation.

But, among the rights of the riparian owner upon a running fresh-water stream (whether navigable in fact or not), there is none so important as "the right to have it come to him in its natural state in flow, quantity, and quality, and to go from him without obstruction, upon the same principle that he is entitled to the support of his neighbor's soil for his own in its natural state," [10] "the right as against other riparian owners to have the water come to him substantially in its natural state both in quantity and quality." [11]

And though there is no right of property in any particular particle of water, or in the entire mass of it, in the sense of absolute ownership, nevertheless the right to have the water flow in substantially its natural state as to quantity and quality, and the *usufruct* therein for any lawful purpose, is property within the protection of the constitution and laws; [12] just as the right to have the hills and forests upon his lands remain in place; [13] and it cannot be taken away from him for public use without due compensation,[14] nor for private use upon any terms save his voluntary grant.[15]

But the riparian owner on a stream navigable in fact must always take care to exercise his right of *usufruct* in this water in such manner as not to interfere with the passage of the public

[9] 1 Farnham, Waters and Water Rights, Chap. V.; Taylor *v.* Comm., 102 Va. 759, 47 S. E. 875.

[10] Lord Wensleydale in Chasemore *v.* Richards, 7 H. L. C. 382; quoted with approval by Cairns, Lord Chancellor, in Lyon *v.* Fishmonger Co., 1 App. Cas. 662.

[11] Mr. Justice Lurton in U. S. *v.* Chandler-Dunbar Co., 229 U. S. 53.

[12] Myers *v.* City of St. Louis, 8 Mo. App. 266; Buckingham *v.* Smith & Dille, 10 Ohio 288; Gould, Waters, § 204.

[13] 2 Farnham, Waters and Water Rights, § 462.

[14] McCord *v.* High, 24 Ia. 336; Bowman *v.* Wathen, 2 McLean 273; opinion of Senator Verplank in Commissioner *v.* Kempshall, 26 Wend. 404.

[15] Kankanna Water Power Co. *v.* Green Bay, etc., Co., 142 U. S. 254; Emporia *v.* Soden, 25 Kan. 588, opinion by Brewer, J. (afterwards Mr. Justice); Janesville *v.* Carpenter, 77 Wis. 288, 46 N. W. 128.

in their boats or barges, lest, as Lord Hale said, he be indicted, and his structures removed as constituting nuisances. (Thus the sovereign exercises its right of jurisdiction.)

When our courts came to have presented to them the question of title to the bed of the large fresh-water streams of this country, they were cited to the common law, as being the law under which the rights of the owner (whatever they were) became vested, and therefore as being the law which must be applied by them. And the riparian owners upon these streams set up the claim to ownership of the beds of the streams to the thread thereof, and of the rights heretofore enumerated.

The rules of the common law, however, came to be misapprehended. And the impression became general in certain jurisdictions that in England (where the test of navigability was whether or not a stream was tidal) there were only two classes of streams, in one of which, title to the bed of the stream was in the sovereign, and all of the owner's rights subject to be defeated at the will of the sovereign; and in the other, title to the bed of the stream was in the riparian owner, and his rights superior and exclusive.

So that it was thought that in England all waters were either "royal," or else absolutely private. And the third class of streams, viz, that in which the riparian owner was possessed of title to the bed, and of numerous rights in the waters thereof, *which must be exercised in subordination to the public right of passage,* was entirely overlooked.

And in consequence these courts were confronted with the choice of rejecting the common law test of navigability, or, as they thought, placing it within the power of every riparian owner upon a stream navigable in fact, to virtually prohibit the navigation of the stream by the public. For, they said, "such a test if applied here would hinder commerce, and take from the State that which rightfully belongs to it. It would render navigable only a very small portion of our rivers and lakes that are in fact suitable to commerce"—consequences, which by every right should be avoided if possible.

The result was that the courts in many States, while adhering to the common law in holding that, as under it, the State owned

the beds of navigable streams, and the riparian owner the beds of non-navigable streams yet having rejected the common law test of navigability, and having made the *fact* of navigation the test thereof, the resulting legal situation was totally different.

Illustrative of this mistaken view is the following expression of the West Virginia court: [16]

> "We have seen that the Ohio River is a great public highway, and according to the overwhelming weight of authority, according to the statutes and decisions of the State of Virginia" (which is not a correct statement) "the riparian owners of lands on its banks have no title as against the State, beyond ordinary high-water mark, and that the title to the bed, the shores and banks to ordinary high-water mark is now in the State of West Virginia for the use of the public. *This conclusion is absolutely necessary to properly preserve for the people the free navigation of that great highway.* If each riparian owner had the right to build a wharf of his own, and to deny the right of any one to land there without paying tribute to him, or to deny him the right to land at all on land adjacent to his farm or lot, the navigation of the river could not in any sense be free. It is the exercise of one of the highest prerogatives of sovereignty for the State to preserve to all the people of this great country the right to navigate the river; and the free navigation of the same carries with it the right to do all that is necessary for the proper and profitable navigation thereof; * * * The great Ohio is composed of its bed, shores and banks, and the water that flows over the bed and shores between the banks, and they are all alike dedicated to public use. It is the heritage of our fathers, carefully guarded, to be used in entire freedom for the purposes of travel, trade, and traffic, and whenever we are within these limits we feel that we are at home and cannot be trespassers."

When, as has been pointed out several times heretofore, there is no single point at which the needs of the State and of the public, and the rights accorded to them by the common law, come into hostile contact with the riparian owner's rights in his lawful exercise of them. So, we observe that the exercise of jurisdiction is perfectly consistent with the full exercise of the

[16] Ravenswood *v.* Flemings, 22 W. Va. 52, 46 Am. Rep. 485, 499.

right to use the waters of a stream for manufacturing or other purposes; so as to the exercise of the sovereign's other rights, as that of franchise, and of regulation and control of commerce upon the waters, if any there be. And where the exercise of the owner's rights brings him into conflict with the right of the public of free and interrupted passage, then that exercise by the owner of his otherwise legal rights becomes unlawful, and must cease.

As stated by Lord Hatherley during the course of his opinion in Ewing *v.* Colquhoun: [17]

> "There are two totally distinct and different things; the one is the right of property and the other is the right of navigation. The right of navigation is simply a right of way, and with that right of way you must not interfere in any course you take."

Or, in the words of Lord Blackburn, in the same case:

> "The public, who have acquired by user a right of way on land or a right of navigation on an inland water, have no right of property. They have the right to pass as fully and freely and as safely as they have been wont to do, but unless there is a present interference with that right or it can be shown that what is done will necessarily produce effects which will interfere with that right, there is no *injuria*, and I think that if there be no *injuria*, the foundation of the right to have the thing removed fails." [18]

Mr. Farnham well said: [19]

> "There has been a great tendency on the part of American judges to attempt to depart from the common law rule, and to place the title to the navigable rivers in the public. For this, many reasons have been assigned, such as expediency, the course of legislation, the inapplicability of the common law to conditions in this country, and public policy. None of these reasons for changing the common law are valid, except that of a statutory change before the rights of the riparian proprietor were acquired."

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[17] *Supra.*

[18] 1 Farnham, Waters and Water Rights, § 29; Ingraham *v.* Wilkinson, 21 Mass. 268; Young *v.* Harrison, 6 Ga. 130; Walker *v.* Board, etc., 16 Ohio 543.

[19] 1 Farnham, Waters and Water Rights, § 50.

So far has this mistake been carried that at least eighteen of our States have rejected the common law, by judicial decision.[20] This excludes decisions subsequent to statutory enactment, which as suggested by the author just quoted, is, when effected prior to the acquirement of rights by the riparian proprietor, the only valid reason for such a step. Twenty-three of our States still hold to the common law,[21] but in many of these the course of

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[20] Alabama: Webb *v.* Demopolis, 95 Ala. 116, 13 South. 289, 21 L. R. A. 62.

Arkansas: Railway Co. *v.* Ramsey, 53 Ark. 314, 13 S. W. 931, 8 L. R. A. 559, 22 Am. St. Rep. 195.

California: People *v.* Company, 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80.

Florida: Florida *v.* Company, 27 Fla. 276, 9 South. 205.

Indiana: Bainbridge *v.* Sherlock, 29 Ind. 364, 95 Am. Dec. 644.

Iowa: Renwick *v.* Company, 49 Ia. 664 (affirmed, 102 U. S. 180, 26 L. Ed. 51).

Kansas: Wood *v.* Fowler, 26 Kan. 682, 40 Am. Rep. 330.

Louisiana: Board *v.* Glassel, 120 La. 400, 45 South. 370.

Minnesota: Carpenter *v.* Board, etc., 56 Minn. 513, 58 N. W. 295.

Missouri: Cooley *v.* Golden, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300.

Montana: Gibson *v.* Kelly, 15 Mont. 417, 39 Pac. 517.

Nevada: Shoemaker *v.* Hatch, 13 Nev. 261.

Oklahoma: State *v.* Nolegs, etc., 40 Okl. 479.

Oregon: Salem *v.* McCourt, 26 Ore. 93, 41 Pac. 1105.

Pennsylvania: Stover *v.* Jack, 60 Pa. St. 339, 100 Am. Dec. 566.

Tennessee: Stuart *v.* Clark, 2 Swan. 9, 58 Am. Dec. 49.

Texas: Austin *v.* Hall, 93 Tex. 591, 57 S. W. 563.

West Virginia: Ravenswood *v.* Flemings, 22 W. Va. 52, 46 Am. Rep. 485.

[21] Connecticut: Chapman *v.* Kimball, 9 Conn. 38, 21 Am. Dec. 707; Welles *v.* Bailey, 55 Conn. 292, 10 Atl. 565, 3 Am. St. Rep. 48.

Delaware: Delaney *v.* Boston, 2 Har. 489.

Georgia: Hendrick *v.* Cook, 4 Ga. 241; Jones *v.* Company, 18 Ga. 539.

Idaho: Johnson *v.* Johnson, 14 Ida. 561, 95 Pac. 499; Lattig *v.* Scott, 17 Ida. 506.

Illinois: Brooklyn *v.* Smith, 104 Ill. 429, 44 Am. Rep. 90.

Kentucky: Berry *v.* Snyder, 3 Bush. 266, 96 Am. Dec. 219.

Maine: Wadsworth *v.* Smith, 11 Me. 278, 26 Am. Dec. 525; Brown *v.* Chadbourne, 31 Me. 9, 50 Am. Dec. 641.

Maryland: Browne *v.* Kennedy, 5 Har. & J. 195, 9 Am. Dec. 503.

Massachusetts: Ingraham *v.* Wilkinson, 4 Pick. 268, 16 Am. Dec. 342.

recent decisions has been such that while the old cases are not overruled, and in many of them such intention is expressly disclaimed, nevertheless, the modern decisions are fast becoming greatly at variance with common law principles. In a number of the States whose judicial decisions follow the common law in the absence of controlling statutory provision, there have been enacted statutes which abrogate it. Thus such provisions are in effect, as to riparian owners taking subsequently, in Louisiana, Nebraska, and numerous others of the States; particularly in the West, where the need of irrigation of non-riparian lands is imperative, and in many of which the law of prior appropriation is in force. In the same way Washington and other States have abrogated the common law by constitutional provisions.

From all of which it may be concluded that in the East, where there is no need for provision for the irrigation of non-riparian lands, nor any other vital public policy to be subserved by a

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Michigan: Lorman *v.* Benson, 8 Mich. 18, 77 Am. Dec. 435.

Mississippi: The Steamboat Magnolia *v.* Marshall, 39 Miss. 109.

Nebraska: Kinkead *v.* Turgeon, 74 Neb. 573, 109 N. W. 744, 7 L. R. A. (N. S.) 316.

New Hampshire: Claremont *v.* Carlton, 2 N. H. 369, 9 Am. Dec. 88.

New Jersey: Society, etc., *v.* Morris, etc., Co., 1 N. J. Eq. 157, 21 Am. Dec. 41.

New York: Smith *v.* Rochester, 92 N. Y. 463, 44 Am. Rep. 393.

North Carolina: Williams *v.* Buchanan, 23 N. C. 535, 35 Am. Dec. 760; Hodges *v.* Williams, 95 N. C. 331, 59 Am. Rep. 242, qualifying the doctrine.

Ohio: State *v.* Shannon, 36 Ohio St. 423, 38 Am. Rep. 599; Railway Co. *v.* Platt, 53 Ohio St. 254, 41 N. E. 243, 29 L. R. A. 52.

Rhode Island: City of Providence *v.* Comstock, 27 R. I. 537, 65 Atl. 307.

South Carolina: McCullough *v.* Wall, 4 Rich, L. 68, 53 Am. Dec. 715.

Utah: Poynter *v.* Chipman, 8 Utah 442, 32 Pac. 690.

Vermont: Miller *v.* Mann, 57 Vt. 475.

Virginia: Crenshaw *v.* Slate Company, 6 Rand. 271; O. D. I. & N. Works *v.* C. & O. Ry. Co., 116 Va. —. The court here disclaims any intention to lay down law as to the waters of the State generally, but the holding seems inconsistent with common law principles.

Wisconsin: Chandos *v.* Mack, 77 Wis. 573, 46 N. W. 803, 20 Am. St. Rep. 139.

Some of these are extremely close to inferential overrulings of the cases cited by subsequent decisions. So that there may be variety of opinion as to the proper classification of a particular State.

rejection of the common law, the State courts should adhere, in the future, as most of them have in the past, to common law principles in respect to this matter; and that the riparian owner, with rights in most cases which vested in colonial days by grant from the crown, is entitled to have those rights preserved to him; and to be in every case held to be the owner of the bed of the stream to the thread thereof, and to have the right to have the waters come to him in substantially their natural state both as to quantity and quality, and to make any reasonable use not impeding the navigation upon the stream, if any there be thereof, consistent with the equal rights of other owners.

So it is to be hoped that the present tendency to depart from the common law will shortly run its course, and that the inclination of our courts will be reversed.

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